Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996	)	CC Docket No. 96-146
	)	
Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services, and Toll-free Number Usage	)	CG Docket No. 04-244
	)	
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170
	)	
Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act, Florida Public Service Commission Petition to Initiate Rulemaking to Adopt Additional Safeguards	)	RM-8783
	)	
Application for Review of Advisory Ruling Regarding Directly Dialed Calls to International Information Services	)	ENF-95-20

Comments of Pilgrim Telephone, Inc.

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SUMMARY

Pilgrim welcomes the opportunity to work with the Commission and other parties in this proceeding to develop rules under Section 228 of the Communications Act of 1934 that will not only provide important consumer protections but will also recognize changes in the information service marketplace and will ensure that information service providers have the flexibility necessary to continue to compete successfully in that marketplace.

Pilgrim is heartened by the Commission's acknowledgment in the Notice of Proposed Rule Making (2004 NPRM) that what the Commission refers to as the "900 number regime" is a system that currently is not functioning well. Pilgrim encourages the Commission to recognize the reasons for this, and then to take action in this proceeding to revitalize the information services marketplace while at the same time safeguarding necessary consumer protections.

There are a number of reasons that the 900 number regime is under siege. First, the Commission bears responsibility because its failure to take action in this eight-year proceeding has left the market in a state of virtually permanent uncertainty. This uncertainty has resulted in customer confusion and has confounded the efforts of information service providers to develop and implement workable business plans.

Second, there has been a tension between interexchange carriers (IXCs) and local exchange carriers (LECs) that is reflected in an unwillingness on the part of LECs to facilitate IXC billing. This unwillingness has severely hampered the ability of information service providers to receive payment for their services.

Third, as new service providers — competitive LECs, wireless carriers, Voice over Internet Protocol (VoIP) providers — have begun to challenge the primacy of incumbent LECs in the local exchange marketplace, these new service providers have shown little inclination to

provide the support necessary to sustain 900 number based information services. This lack of support has further undermined the information services market.

In light of these developments, there are three critical steps the Commission must take to cure the problems it has identified in the 2004 NPRM. First, the Commission should now move quickly but deliberately to take final action in this proceeding and end the uncertainty that has plagued consumers and industry participants alike. It is incumbent upon the Commission to act promptly in order to remedy its failure to move effectively toward implementation of statutory changes enacted eight years ago.

At the same time, the Commission must be careful to act deliberately. Sound public policy and procedural fairness dictate that the Commission should use the record first compiled eight years ago, together with this new record, to fashion a new set of proposed rules. It would be extraordinary for the Commission to take its proposal from 1996 and attempt to promulgate final rules without giving parties an opportunity to review and comment upon the Commission's tentative assessment of how intervening events should be taken into account. Although the 2004 NPRM makes a good start, it should be supplemented by a further notice of proposed rule making that presents specific and concrete proposals which can be evaluated by interested parties before the Commission takes final action.

Second, the Commission should craft flexible rules that give information service providers a realistic opportunity to provide their services on demand to consumers who place a premium on real time, instantaneous access to the information services they seek, that ensure that information service providers will be able to receive payment for the services they provide, and that protect consumers from being billed for services they did not seek to obtain. In this regard, Pilgrim endorses the use of oral verifications, as discussed by the Commission in the 2004

NPRM, as one means by which information services can be provided in quick response to consumer demand while, at the same time, consumer interests can be effectively protected.

Third, the Commission can act to address some of the problems described above by taking action to require carriers — including incumbent LECs, competitive LECs, VoIP providers, and wireless providers — to cooperate with information service providers and provide the support necessary to preserve the viability of information service offerings. A critical step is for the Commission to require that LECs must provide billing and collection for 900 based information services. The withdrawal of this billing and collection has had a severe effect on the ability of information service providers to receive payment for their services. Both information service providers and the customers who demand these services would be well served by the Commission's mandating that billing and collection must be made available on reasonable terms and rates. If the Commission is committed to giving information service providers a fair opportunity to compete in the marketplace, then such a mandate is the single most important step the Commission could take to achieve this objective.

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Comments of Pilgrim Telephone, Inc.

Pilgrim Telephone, Inc. (Pilgrim), by counsel, hereby submits its Comments in the above-captioned proceeding in response to the Commission's request for comments.[1]

I. INTRODUCTION

A. Background and Summary of Status

The Commission undertook a rule making pursuant to a Notice of Proposed Rule Making issued by the Commission in July of 1996.[2] The NPRM was issued in response to changes made

[1] Notice of Proposed Rule Making and Memorandum Opinion and Order, FCC 04-162, released July 16, 2004 ("2004 NPRM").

by Congress in the Telecommunications Act of 1996.[3] While numerous parties, including Pilgrim, filed extensive comments in that original proceeding, the Commission never adopted new rules or completely conformed its rules with the changes made in the statute.

The Commission then sought to refresh the record in the 1996 NPRM proceeding pursuant to a Public Notice issued in 2003.[4] Pilgrim participated in both proceedings. The Commission has not to date, however, issued any rulings in either the 1996 NPRM proceeding or in the wake of the Public Notice it issued in 2003. Instead, by the issuance of the 2004 NPRM, the Commission effectively dismisses all prior proceedings, initiates a new rulemaking, and seeks to develop a new record. Pilgrim welcomes this opportunity to comment on the Commission's 2004 NPRM, and to work with the Commission and the other parties to this proceeding to revise the Section 228[5] rules so that they actually function to provide important consumer protections and facilitate the competitive operations of information service providers.

The Commission has evidenced a callous indifference to the burdens that it has placed on the information services industry, the telecommunications industry, and consumers, in general, who have participated in the prior proceedings and sought the Commission's guidance and assistance. The parties that participate in the Commission's rule makings take their participation very seriously. They expend substantial time and money to make their views known and participate in the Commission's processes. For the Commission to simply shelve these

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[2] In the Matter of Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996, CC Docket No. 96-146, Order and Notice of Proposed Rulemaking, FCC 96-289, released July 11, 1996 (1996 NPRM).

[3] P.L. 104-104, Sec. 701, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 228).

[4] Public Notice, "The Consumer & Governmental Affairs Bureau Seeks Comment To Refresh the Record on the Commission's Rules Governing Interstate Pay-Per-Call & Other Information Services," CC Docket No. 96-146, DA 03-807, released Mar. 17, 2003.

[5] 47 U.S.C. § 228.

comments, however, and fail to ever issue any ruling, is not only inconsiderate, it borders on malfeasance.

The Commission and the parties to the prior proceedings noted substantial dislocations in the functioning of the industry, as well as problems with consumer protections. The Commission ignored all of these issues and caused the efforts of all of the parties to be wasted. Pilgrim hopes that the Commission take its Congressional mandate more seriously in this proceeding and attempts not only to engage the party participants, but work to resolve the issues identified by it and by the parties.

During the time of Commission inaction, as the Commission itself notes in the 2004 NPRM, the use of 900 numbers and the "900 industry" have practically vanished.[6] Most information service providers have moved onto other platforms that are simply not addressed by the Commission's rules, or are outside of the Commission's jurisdiction. The reasons for these changes have been commented on by the parties to past proceedings, and are due to actions by the long distance carriers (IXCs) and local exchange carriers (LECs), inaction by the Commission, technological changes and advances, and simple entrepreneurship. In particular, 900 number service providers have been victimized by a tension between IXCs and LECs that has led LECs to resist any facilitation of IXC billing, thus undercutting any effective billing for 900 services.

Another reason for the threatened extinction of 900 number services has to do with the fact that the calling platforms from which 900 calls originate, which long were the exclusive domain of the incumbent LECs, have become increasingly diverse, with the advent of competitive LECs, Voice over Internet Protocol (VoIP) telephony, and wireless services. None

[6] *See* 2004 NPRM at para. 20.

of these new service providers supports 900 services through transport or billing. As consumers migrate to these new alternative sources for local exchange services, the use of 900 services inevitably has declined because these alternative sources do not support 900 services.

In order to recapture and enforce its role as a meaningful regulator and consumer protector, the Commission needs to undertake a number of serious reforms of its regulation of information services. It needs to correct the deficiencies in the current system that have led to its almost total collapse, extend portions of its rules over all delivery mechanisms, recognize the manner in which the industry now functions and incorporate those changes into the rules and dispose of those portions of the rules which have become archaic or dysfunctional.

One important aspect of this need for reform should be highlighted. The provision of 900 service will not work in the absence of cooperation among carriers and service providers whose functions are critical all along the call chain. The Commission should not undertake any effort to preserve and sustain 900 number based services if the Commission is not willing to embrace the irreducible fact that this cooperation is essential. As Pilgrim argues throughout these Comments, one important link in the chain is the cooperation of LECs in providing transport and billing and collection for 900 services. The Commission should be prepared to mandate the provision of LEC transport and billing and collection, or, at a minimum, the provision of real time billing information sufficient to ensure that 900 service providers are able to receive payment for their services. If the Commission is unwilling to mandate this cooperation from the LECs, then the Commission should accept the consequence that 900 services cannot long remain viable.

B. Incorporation of Prior Comments and Reply Comments

Pilgrim hereby incorporates its comments and reply comments that it filed in the 1996 NPRM, as well as in the 2003 proceeding, to the extent relevant to the current proceeding.

Pilgrim incorporates its comments and reply comments by reference in lieu of resubmitting them in total at this time.

II. WHAT HAPPENED TO 900 NUMBER SERVICES?

A. 900 Numbers As Obsolete

The Commission notes in its 2004 NPRM that the use of 900 numbers has decreased substantially.[7] The numbers cited by the Commission barely tell the story, however. With the exception of a few minor uses, 900 numbers account for only a small fraction of information services delivered via telephone today. Most information services are delivered via toll free numbers using pre-subscription agreements or credit cards for billing, various POTS ("plain old telephone service") variations for service delivery and billing, and international calling and billing mechanisms. The Commission's own inaction is principally to blame for the migration to service platforms, many or most of which are not regulated by the Commission.

B. Reasons for Obsolescence

Underlying service providers ceased making the building blocks for many information services available. Most carriers have ceased providing 900 number transport. For the few who still provide transport, billing is not supported by the LECs. 900 number calling without billing is not sustainable because the information is not available, on a real time basis, to perform the billing, and experience demonstrates that consumers simply do not pay the charges if they are not on the local carrier's bill.

There is a natural tension between the LECs and the IXCs, which is why any telephone billing, and in particular 900 number billing, will not work. The LECs do not want to facilitate IXC billing. In order for any telephone billing or 900 number billing to work the LECs would

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[7] *Id.*

have to be ordered to provide billing and collection for 900 number charges, at a reasonable price, and to sustain all charges once an oral record or other proof sustaining the charge was provided. The cooperation of every party in the calling chain needs to be required for 900 numbers to work. If the Commission is not willing to require and enforce cooperation, any further discussion of the validity of 900 numbers is moot, and the rules should be left alone.

Even before most of the carriers stopped providing the building blocks for information services, they had increased the charges levied upon service providers for 900 number service to non-economic levels, destroying the viability for this form of per-per-call provision for most services and providers. The transport rate alone charged by IXCs for 900 number traffic is several times higher than the transport rate for 800 number traffic, even though the underlying circuits are the same. The billing and collection charges levied by the LECs are equally outrageous.[8] It is clear that in light of the absence of any Commission direction or control, the carriers determined that they each wanted a piece of the perceived profits made by information providers and priced their services accordingly. This greed, however, now threatens to terminate the viability of the industry.

C. Technological Changes That Drive Obsolescence

900 number billing is also becoming obsolete and extinct because of migration of consumer local exchange services to providers of Internet telephony (VoIP), wireless telecommunications and CLEC services. None of these providers supports 900 number transport or billing. In order to preserve 900 numbers as a viable service offering, the Commission would

[8] These billing and collection rates charged by LECs are not subject to any regulatory oversight, because of what Pilgrim considers to be the misguided view that information service providers have available to them "competitive" alternatives to LEC-supplied billing and collection.

have to order all of these alternate providers to provide transport and billing and collection, and require them to sustain charges.

D. Other Factors Leading to Obsolescence

The Commission's regulations requiring statements on phone bills that customers were not required to pay for 900 number traffic, while an important consumer protection, also contributed to the demise of the use of 900 numbers. Consumers often read the disclaimer as a statement that they did not have to pay for the charges at all, and for consumers who were inclined to engage in fraudulent conduct, the disclaimer was an invitation not to pay at all. In combination with the disclaimer, the LECs began to engage in a well documented practice of refusing to sustain charges when challenged, and offered to remove the charges upon any consumer inquiry, regardless of how minor it was.[9] The LECs became so sensitized to consumer complaints related to 900 numbers, they rarely collected more than thirty percent (30%) to forty percent (40%) of the charges, making the offering of service impractical.

Other issues the Commission failed to address led to this demise of the 900 service industry. While portability is required for most exchanges, the Commission never mandated portability for the 900 number exchange. As carriers ceased providing this service, information service providers were not permitted to port their numbers to carriers who could, or would, provide service.

III. THE NATURE OF PAY PER CALL SERVICES

Understanding the nature of pay-per-call services is necessary to evaluate which regulations are necessary and appropriate with respect to them. Pilgrim suggests that pay-per-call services (and information services generally) share the following characteristics:

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[9] *Cf.* 2004 NPRM at para. 20.

A. Instant-access On-demand Service.

Information services provided over the telephone are instant-access on-demand services. When consumers dial an information services number they are expecting to receive the service immediately upon completing the call (and any required preambles). Each delay in the provision of service causes significant dropping of the calls by consumers, much like that experienced in the Commission's post-dial delay studies. Procedures that delay the provision of service, particularly pre-subscription requirements that require days or weeks to complete, destroy the nature of telephonic information services, and destroy consumer demand for the services.

B. Instant Billing Service

Information services provided over the telephone are services that require instant billing. As the information being provided is aural, there is no long term tangible object of value obtained. Provision of the service and consumer satisfaction is instant, and temporal. Any delay in billing for the service substantially increases the likelihood that the consumer will not remember the specific event of requesting and receiving the service. Any delays in billing and collection will increase the likelihood that the service provider will not be compensated, and that the provider will either have difficulty in staying in business or will have to substantially increase prices to recover billing losses.

C. Billing Is Dependent on Carrier Cooperation.

Billing for information services is largely dependent upon carrier cooperation, regardless of whether the carrier is providing billing and collection. It has been undisputed among information service providers, and has been Pilgrim's experience, that there is no substitute for carrier billing for information service calls on the consumer's telephone bill. Telephone billed charges are appropriate for services provided over the telephone. Using the consumer's monthly telephone bill to bill for information service calls ensures billing to the customer on a timely

basis, reflecting the purchase of a telecommunications-provided service in the time period in which all other telephone services are also billed.

The LEC serving the customer has all of the subscriber's information, on a real time and current basis. Information providers and third parties can only do so much to attempt to verify any information provided by a caller, and relying on the telephone company's information is the only sure way to know the identity of the subscriber and essential information for the verification of billing and identity information provided by a caller. The telephone company has all of the billing information relating to the subscriber and can validate and bill for the service in a more cost efficient and reliable manner than the information service provider.

When the LEC chooses not to provide billing and collection services the sharing of key customer information between the LEC and the information service provider is essential. Only by accessing this information on a real time basis can the information service provider make an informed decision as to whether to service a call, and determine whether the caller's identity and billing information are legitimate and accurate. LEC failure to provide this information on a real time basis creates too many risks for the information service provider and the subscriber. Delays in the provision of information inhibit (1) validation of identity and billing information by information service providers, and (2) rejection of fraudulent charges being billed to subscribers via identity theft.

Whether or not the LEC provides billing and collection services, the provision of Customer Proprietary Network Information (CPNI) relating to subscribers on a real time basis upon call initiation is essential for the proper provision of information services by third parties, billing for charges incurred, and interdiction and eradication of service theft.

IV. RESPONSES TO QUESTIONS POSED BY COMMISSION

In the following paragraphs Pilgrim responds to many of the specific issues identified by the Commission in the 2004 NPRM.

A. State of 900 Number Service Provisioning.

As Pilgrim stated in its introduction, and as finally recognized by the Commission in the 2004 NPRM, the 900 number industry has shrunken to the point of being largely irrelevant. Most information service providers have moved to other dialing and billing platforms. Evidence of this migration is evident not only from the Commission's own numbers showing a marked decrease in the use of 900 numbers, but in a casual review of magazine advertisements for information services. A review of most magazines that contain information service advertisements demonstrates that a wide variety of other platforms are used — toll free, international and POTS — and that these alternate platforms form the vast majority of all information services.

A problem, of course, is that most of the Commission's consumer protections do not extend to these other platforms. The advertising, disclosure and other rules only apply to 900 numbers. Not only has the Commission's failure to take any action to help preserve the 900 number industry led to a migration of information services, it has failed to establish any standards for the alternate platforms. In this rule making the Commission needs to separate the consumer protections that work from those that do not, and uniformly apply them to all service platforms.

In addition, if the Commission is interested in maintaining the viability of an information services industry, it needs to also mandate that all telecommunications carriers, including both IXCs and LECs, make available on reasonable terms the underlying building blocks necessary for the efficient and competitive offering of these services, including billing and collection and

transport. The Commission may be able to reverse the downward trend in the provision of 900 services if the Commission recognizes that the provision of 900 services is not and cannot be viable in the absence of the provision of billing and collection services by the LECs.

The Commission must mandate a requirement that LECs make billing and collection available to information service providers at reasonable rates, and that LECs refrain from any refusal to bill charges to particular customers of information service providers once the service providers have presented an oral record or other sufficient proof that the charges have been correctly billed for services rendered. Without the imposition of such a mandate, the LECs will continue to turn their backs on 900 service billing, and consumers, as a consequence, will de deprived of services that have proven their appeal and durability in the marketplace but that cannot survive so long as the LECs continue to pull the plug on the billing and collection lifeline.

Revival of 900 services is also dependent on the Commission's taking action that acknowledges and addresses another trend that has crippled 900 service providers. As Pilgrim has noted in these Comments, alternative providers of the platforms from which 900 calls can originate — competitive LECs, wireless carriers, VoIP service providers — do not provide any transport or billing and collection for 900 service calls. If the Commission seeks to preserve the 900 service market, in part as a means of safeguarding consumer protections that are specifically geared to calls to 900 numbers, then the Commission should act to require these alternative providers to make transport service and billing and collection available on reasonable terms to 900 service providers.

B. Credit Card and Calling Card Charged Services; Jurisdiction

The Commission has indicated that it may be leaning towards levying additional requirements on services that are charged to calling cards and credit cards. There is no reason for the Commission to undertake this action, regardless of the dialing pattern used by the

consumer or the information provider. Congress explicitly found that these other billing mechanisms had their own consumer protection rules, which is why calls using those billing mechanisms are exempt from Commission jurisdiction, except for the initial price disclosures. The Commission should not attempt to layer additional requirements on calls using these mechanisms, and Pilgrim doubts whether the Commission even has the jurisdiction or statutory authority to adopt additional requirements. The Commission would further harm the industry and complicate its regulation by venturing into this area, and can achieve no legitimate purpose.

Likewise, the Commission should refrain from adopting additional rules that overlap or conflict with the jurisdiction of the Federal Trade Commission. Congress granted each agency clear responsibilities, and there is no need for this Commission to attempt to cross the boundaries clearly drawn by Congress.

C. The Problems with Toll Free Numbers

The Commission notes that it has received almost 5,000 complaints regarding toll free numbers, and requests comments on why there are still so many complaints.[10] It is almost impossible to address the Commission's question regarding the impetus of these complaints, as it provides no data regarding the nature of the complaints. In fact, it could be that none of the complaints relates to information services, but that the complaints relate instead to customer confusion between the various toll free prefixes. Without summarizing and sharing the information that it has on hand, it is virtually impossible to intelligently respond to the Commission's statements or its request for comments on possible solutions.

In fact, Pilgrim believes that it is very likely that few, if any, of the complaints mentioned by the Commission are relevant to information services. When a presubscription, comparable

[10] *Id.* at para. 11.

relationship, calling card or credit card is used by a caller to an 800 number, it is highly unlikely that a complaint will be lodged with the Commission. It is much more likely that any complaint will be lodged with the issuer of the presubscription agreement, or calling card or credit card company. Dispute and consumer protection mechanisms for these billing methods are adequately addressed in other laws, and the Commission should not risk adopting overlapping, potentially conflicting or unnecessary regulations.

It has been Pilgrim's experience that, when it provided service over an 800 number and billed through a presubscription agreement onto a phone bill, most complaints arose from the Commission's own Truth in Billing rules.[11] Those rules require that the actual number dialed be placed on the bill. On its face this rule does not make any sense, and it is clear why consumers may be confused. 800 numbers are toll free numbers. When consumers receive a bill that indicates they are being charged for a call to an 800 number, they complain. Consumers are not being charged for a call to an 800 number, however, they are being charged for information services separately purchased. To show the 800 number that was dialed on the bill is misleading and contributes to consumer confusion.

The Commission should repeal this requirement. The Commission should permit an information service provider to place the final number reached on the bill — whether it is a 500, 700 or POTS number — in place of the 800 number dialed. The bill already contains an 800 customer service number for the consumer. To require the placement of a dialable number or an 800 number in the "called to" field simply adds unnecessary confusion.

[11] *See* 47 C.F.R. §§ 64.2400-64.2401. *See also* Truth-in-Billing and Billing Format, CC Docket No. 98-170, First Report and Order and Further Notice of Proposed Rule Making, 14 FCC Rcd 7492 (1999).

In addition, the 800 or other numbers initially dialed may have no bearing on the service ultimately purchased by the consumer. It is common to offer a number of services from a single 800 number platform. Placing that initial dialed number on a bill does nothing to identify the service purchased. Placing the number associated with the service ultimately purchased, however, lets the information service provider immediately know, when the consumer calls to inquire, which service was purchased. So long as a general toll free customer service number is placed on each bill, the Commission should permit the information service provider leeway in the numerical identifier used for each call.

Pilgrim also notes that a privacy issue is involved. Depending upon the service being purchased, a subscriber may have legitimate reasons for wanting certain, or different, information being placed on a bill so that third parties are not made aware of the purchase choices made by the subscriber. It is not uncommon for information service providers to enter into agreements with subscribers to bill charges under a generic service description so that the subscribers' privacy in their purchase choices is preserved. The Commission should recognize these contractual relationships and honor the privacy requests of subscribers, and permit information service providers to place pre-approved numbers and descriptive texts on bills.

D. Extension of Protection to Subscribers

Pilgrim has concerns regarding the Commission's proposal to extend toll-free number protections to subscribing parties, in addition to calling parties.[12]

Subscribers to telephone service have an obligation to maintain some controls over the use of their telephones. The consumer protections enacted by Congress and reflected in the Commission's current rules would seem to be sufficient to protect both calling parties and

[12] 2004 NPRM at para. 12.

subscribers. In the case of presubscriptions and comparable arrangements, it is the calling party who is being charged. In the event that the calling party is authorizing charges to the subscriber, presumably the calling party has access to the subscriber's line. No one disputes that subscribers can authorize charges to their lines, and in the case of multiparty households presumably everyone in the household is authorized to place charges on the phone bill.

The identity of the subscriber can largely be irrelevant, as well. In the case of married couples in community property states, both parties are liable for all charges placed to the line, and the fact that one or the other is identified as the subscriber is irrelevant. Congress chose not to focus on subscribers, but instead on calling parties, and presumably had good reasons for doing so. The Commission should not change this focus.

The Commission can adequately address the problems it has identified by adopting the recommendations that Pilgrim makes herein. Information service providers should be provided with a safe harbor when they use and keep voice prints — recordings of voice verifications of the calling party. Obtaining and keeping voice prints can verify that a calling party has agreed to the terms of service, and can assist billing entities in tracking down fraud attempts, and subscribers in determining who with access to the telephone has incurred charges (particularly if the calling party had misrepresented authorization). Requiring information providers to keep voice prints and accurate billing records should be sufficient to protect subscribers without venturing into difficult areas such as requiring information service providers to supply written proof of subscriber authorization, and attempting to examine the relationship between the subscriber's identity and the legal entity obligated to pay for service.

E. Use of Number Identifications (ANI and Caller ID)

The Commission seeks comment on whether it should prohibit billing calls dialed to 800 or other toll-free numbers on the basis of not just Automatic Number Identification (ANI), but

also equivalent information (*e.g.*, "charge number" conveying similar information in a System 7 environment) that automatically provides calling number identification.[13]

ANI and other caller information are essential for an information service provider to be able to verify the identity of a calling party and any security inquiries it may ask of the calling party. Pilgrim is generally opposed to expanding the prohibition of using ANI principally because of the ambiguity of the current rules and the Commission's proposal. In fact, this information is commonly used to verify credit card and other charges, and to track down fraudulent use of credit mechanisms.

The current rules prohibit billing on the basis of ANI, but the Commission should clarify exactly what is meant by the prohibition. Use of ANI to confirm identity or open an account should be permitted, even when billing solely based upon ANI is prohibited. Likewise, any extension of the ANI prohibition, as proposed by the Commission, needs to be more precise so that parties have meaningful notice of what might be prohibited, and the prohibition should not prevent collection and reliance on the additional information for the purposes of verifying identity or establishing an account.

F. Consumer Protection in General

Pilgrim believes that too much emphasis has been placed on the presumed benefits of 900 number blocking. While 900 number blocking could presumably permit a subscriber to prevent access to 900 number services, the benefit of 900 number blocking has been rendered irrelevant due to migration of information services to alternate platforms. Even when services are provided over 900 numbers, the blocking mechanism does not screen for minors or unauthorized use, but instead it indiscriminately prevents access by all callers. If a subscriber decides not to order 900

[13] *Id.* at para. 14.

number blocking, or wants access to some 900 number services but not others, the blocking capabilities do not screen for minors or prevent access by unauthorized persons.

While 900 number blocking provides some consumer benefits, its inherent weaknesses and the failure of the Commission to ensure a viable 900 number industry have destroyed any value in blocking. Presubscription, comparable arrangements, voice recordings of authorizations to provide service, and screening mechanisms all provide more protection than 900 number blocking ever could provide. Due to the lower cost of 800 number transport, or the absence of transport costs to information service providers when the consumer pays for transport (direct dialed access and collect call access), information service providers have much more flexibility to screen customers, engage in pre-service inquiries and verify customer identities prior to providing access when non-900 numbers are used.

In the 2004 NPRM the Commission identifies a type of fraud that is based on redirecting a consumer's call without the consumer's knowledge.[14] Notice and acceptance requirements, which could be as simple as an electronic record or recorded oral verification, could adequately address the problem of "modem hijacking"[15] and similar schemes aimed at directing consumers through expensive calling arrangements without notice. Modem highjacking is a specialized type of fraud that is outside of the scope of pay-per-call and information services, and while it is a practice that should be prohibited, it is not particularly relevant in this proceeding.

There is no need to prohibit arrangements where information service providers provide service over either POTS numbers, international numbers or collect calls, and receive their sole remuneration from a commission on the call. Rather than attempt to prohibit such arrangements,

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[14] *Id.* at para. 16.

[15] *See id.* at para. 17.

or review all relationships between carriers and information service providers, the Commission could simply adopt a mechanism for determining when such relationships are reasonable. The model that Pilgrim has in mind is that implemented by the Commission after the passage of the Telephone Operator Services Consumer Information Act (TOSCIA). After Congress passed TOSCIA, the Commission benchmarked a rate for operator service calls. All call charges that fell within the benchmark were presumed to be lawful.

The Commission could adopt a benchmark regime in the current instance.[16] Pilgrim recommends that all carrier/information service provider relationships be presumed valid so long as the per minute rate of the call (including call set up charges and surcharges) does not exceed the rate charged by either the dominant carrier or that of any of the three largest carriers providing the equivalent service — domestic long distance casual access operator assisted service, casual access international operator assisted service, or other similar service category. So long as the charges for the call fall within the benchmark rates the fact that an information service provider receives a commission for the call would be irrelevant. Pilgrim proposes that for all of these calls all of the on-call and advertising disclosures would still apply, but that the calls would be billed as regular common carrier charges without segregation or additional notification.

G. The 900 Number Regime

As Pilgrim states elsewhere herein, it may be too late for the Commission to revive the 900 number industry, and the Commission may be better off attempting to ensure consumer protection for information services provided on other platforms, without undertaking onerous regulations that will further impede the offering of information services..

[16] See also our discussion in Section IV.J., below.

In the event, however, that the Commission has any interest in reviving the 900 number industry, it would, at a minimum, have to undertake the following reforms:

1. Make 900 numbers portable.

2. Require IXCs to offer 900 number service at transport prices comparable to 800 number transport services.

3. Require LECs to bill for all 900 number calls at reasonable cost-based rates.

4. Require LECs to sustain all charges for which there is a recorded verbal authorization, and prohibit them from issuing blanket recourses that exempt customers from paying for legitimate charges.

5. Require VoIP, wireless and CLEC carriers to transport and bill for information services, and to sustain properly validated calls.

H. Presubscription or Comparable Arrangement

The Commission points out that, in its 1996 NPRM, it proposed to make clear that, to operate outside of 900 numbers, audiotext information services must either have presubscription agreements executed in writing or, alternatively, require that payments be made through direct remittance, prepaid accounts, or debit, credit, charge, or calling cards.[17] The Commission now seeks further comment on the "usefulness and practicality" of this proposal, and also asks whether there is still a need for "such changes in this area given developments in electronic commerce and related laws, and the now-common use of third-party verifications in telephone transactions."[18]

As Pilgrim sets forth in the introduction, the essence of information services is the ability of consumers to access the service on demand, without delay, and for the provider to obtain reliable and timely billing and collection. In order to preserve the access on demand element

[17] 2004 NPRM at para. 22.

[18] *Id.* at para. 23.

while providing the consumer protections the Commission seeks, Pilgrim proposes two new methods of establishing a presubscription arrangement under the rules.

Under both scenarios the consumer would be provided with the rules of service and would be required to respond to a list of questions geared to verify identity, authorization to access the service from the calling line and majority age. The information service provider could then choose between two presubscription verification methods. The information service provider could employ third party verification, like that used to switch long distance carriers. An important element of this scenario would involve a requirement that the third party verifier or the information service provider must keep a recording of the presubscription session. The customer would be provided access to the service upon conclusion of the presubscription session.

Under the second scenario, instead of using third party verification, the information service provider would mail a welcome package to the new subscriber, and would provide instant access to the service. The information service provider would have to hold all billings for ten (10) days, until the customer had a chance to call and revoke the account as unauthorized, or the package was returned undelivered. If neither event took place, the subscriber account would be made permanent and billings would be processed.

Both of these scenarios provide information service providers with the necessary flexibility to provide services on demand, while preserving important consumer protections. As Pilgrim has emphasized elsewhere in these Comments, the ability to provide information services on demand is a critical element in the success of information service offerings because most consumers expect and demand that their requests for information services will be met promptly by the information service providers. The Commission must recognize this important feature of information service offerings, and must strive to design and implement rules that,

while safeguarding sufficient protections for consumers, also enable information service providers to verify quickly that they are dealing with authorized requests for service and to respond to these service requests with the immediate provision of service. The information service industry has struggled in large part because of a failure by the Commission to ensure that rules are in place that minimize customer confusion, that establish necessary consumer protections, and that, at the same time, extend to information service providers the tools that are the *sine qua non* for their opportunity to operate in a highly competitive marketplace, namely, the flexibility to respond in real time to consumer service requests.

I. Billing

The 2004 NPRM summarizes current rules "governing billing specifically for pay-per-call services and those for charges billed through toll-free numbers," and the Commission then seeks comment on whether the rules are sufficient to address any current billing concerns.[19]

As Pilgrim discussed above, the billing disclaimers that have been required by the Commission, along with the practices of some of the LECs, have led to many consumers refusing to pay legitimate information service charges. The requirement to list the 800 number dialed when 800 number access to information services is provided leads to consumer confusion. If customers are provided with all of the notices recommended by Pilgrim and required by the rules, and subscription verification is either kept in a recording or verified by mail, additional billing requirements provide little additional consumer benefits and should be rejected as an unnecessary additional burden on information service providers and billing entities.

[19] *Id.* at paras. 25-27.

J. Revenue Sharing Arrangements

The Commission seeks comment in the 2004 NPRM on certain issues relating to revenue-sharing arrangements.[20] Pilgrim discussed revenue sharing agreements in its prior comments, which arguments are presented below.

Revenue splitting relationships and commissions for stimulating traffic have been standards in the telecommunications industry for years. Revenue splitting relationships between carriers and information service providers do not need to be prohibited so long as the total charge for the service does not exceed established benchmarks. Calls that are billed within established benchmarks should be treated as regular long distance calls without any further requirements.

K. Directory Services

The Commission seeks comment on the narrow question "of how to further define 'directory services' that are specifically exempt from the consumer protections of pay-per-call, regardless of whether any presubscription or comparable agreement exists."[21] Defining the types of directory services that are permitted under the rules may be unnecessarily difficult. So long as the proper disclosures and verifications have taken place during the call, the Commission should permit information service providers to accept calls to 800 number based directories of services, and to complete calls to an information service platform when call completion is requested by the end user. So long as all of the disclosures and verifications are provided, Pilgrim believes that there is no harm in completing a call to an information service that originated with a call to an 800 number based directory of service.

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[20] *Id.* at para. 31.

[21] *Id.* at para. 34.

L. Data Services

Pilgrim believes that data services are exempt and should remain exempt from regulation under Section 228. We will discuss this issue further in our Reply Comments.

M. Wireless Services

Pilgrim also believes that wireless services should be exempt from regulation. The consumer protection concerns that apply to the use of wireline phones to make calls to information service providers do not apply in the case of the use of wireless phones for such purposes. Wireless phones are provided to individuals, and are not tied to specific locations like land line phones. Wireless customers enter into subscription agreements with their carriers, and these agreements can incorporate terms that authorize access to information services. As a consequence, there is no need for the Commission to undertake the promulgation of rules applicable to the provision of information services to wireless phones.

Pilgrim supports the argument presented by AWS in the 2003 NPRM proceeding that wireless-based information services are not, and should not be, subject to the TDDRA rules. Pilgrim believes there are convincing public policy reasons for the Commission to take such view, and such a view would be consistent with congressional intent in enacting Section 228 of the Act. If the Commission is reluctant to reach a final determination regarding AWS's clarification request based upon the present record, then Pilgrim believes that, at a minimum, the Commission should initiate a further rulemaking in this proceeding to explore in greater detail both the proposal advanced by AWS and alternative means of fostering wireless-based information services. Pilgrim also believes that there is a basis for the Commission to forbear from the application of Section 228 in the case of wireless carriers. These issues are discussed in turn in the following sections.

1. Public Policy Considerations Support a Finding by the Commission That Wireless-Based Information Services Should Not Be Subject to Section 228 Requirements.

The proposal advanced by AWS provides an important opportunity for the Commission to pay greater attention to a responsibility that thus far has been neglected in the Commission's actions and deliberations regarding implementation and enforcement of Section 228. Specifically, the Commission has done little to promote the development of what AWS characterizes as content enriched voice information services.

The Commission has focused its effort on devising mechanisms intended to protect consumers from deceptive and abusive practices. While these efforts are important, and in fact have been mandated by Congress in its passage of Section 228, the Commission's myopic approach to its task, as reflected by its proposals in this rulemaking, would impose unnecessary and burdensome requirements on legitimate carriers and IPs who pose no threat to consumer well-being and are striving to meet consumer demand for a wide array of information services. Still worse, the Commission's approach has side stepped the congressional mandate that the Commission must seek ways to promote the growth and vitality of an information service industry that has been successful in other countries[22] but has struggled in the United States because of regulatory burdens and unfair carrier practices.

Against this backdrop, it is incumbent upon the Commission to give consideration to AWS's request for clarification. Pilgrim believes that such consideration should lead to the conclusion that granting AWS's request would be an effective way to promote the development and delivery of a rich array of information services to consumers and to promote greater competition in the information services marketplace. Several reasons support this view.

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[22] *See* Brierfield 2003 Comments at 1-2; *see also* WHC 2003 Comments at 2.

First, wireless platforms for information services hold the prospect for the development and deployment of a wide range of innovative services. AWS, for example, explains that it could enhance its current offerings in order to provide services and products such as stock quotes, airline information, weather, traffic, and sports reports, hotel and rental car reservations, downloadable games, ring tones, and graphics, personalized song dedications or wake up calls to other parties, and portals for access to community chats and message boards and to content furnished by third party providers. AWS 2003 Comments at 3-4.

Given the fact that there has been strong consumer demand for wireless data-based information services[23] (which are not subject to the requirements of Section 228), it is reasonable to conclude that, if regulatory obstacles were removed, there would also be strong consumer demand for wireless content-rich voice services. Taking steps to facilitate the delivery of these voice services to the marketplace would advance the congressional mandate that the Commission should encourage the development and growth of IP services.[24]

Promoting the availability of such services would also be consistent with long-standing Commission policies favoring the development of innovative wireless services,[25] and with Commission policies favoring market forces, and not regulation, as the best means to promote

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[23] *See, e.g.*, Verizon Wireless Press Release, "In Just Six Months, Get It Now℠ Proves Itself as an Overachiever," Apr. 30, 2003 (in the first six months after the launch of Get It Now, a service that enables customers to download entertainment and productivity tools over the air, consumers downloaded 8.5 million Get It Now games, ring tones, entertainment applications, and other applications).

[24] It also should be noted that Congress has instructed the Commission to eliminate "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services . . . ." 47 U.S.C. § 257(a).

[25] *See, e.g.*, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, Second Report and Order, FCC 94-61, 9 FCC Rcd 2348 (1994) (*Competitive Bidding Second R&O*), at para. 3 ("Structuring our [spectrum auction] rules to promote opportunity and competition should result in the rapid implementation of new and innovative services and encourage efficient spectrum use, thus fostering economic growth.").

wireless services that benefit consumers and foster competition.[26] The Commission has seen the wireless industry as an important player in the telecommunications marketplace, representing a potential competitive counterweight to wireline carriers in local markets, and the Commission has looked to the wireless industry as an important source of cutting edge technologies that can bring affordable, next generation services to a wide spectrum of business and consumer markets.[27] Using wireless platforms for the delivery of content-rich voice information services should be the next step along a continuum of Commission efforts to facilitate realization of the potential of wireless carriers to expand the horizon of services available to American consumers.

Second, application of the Section 228 requirements to wireless-based voice information services would hamstring the ability of wireless carriers such as AWS to bring to market many of the types of services described above. Evidence of this is the fact that, even though wireless-based data information services such as Verizon's Get It Now℠ Service are prospering in the marketplace, voice-based information services have not emerged.

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[26] *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993: Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Third Report, 13 FCC Rcd 19746 (1998) at 5 ("Telecommunications devices exist today that were not imagined only a few years ago. The Commission does not wish to impose regulations that will slow the emergence of new, innovative technologies."); Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993: Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Second Report, 12 FCC Rcd 11266 (1997) at 3 ("The Commission has continued systematically to remove regulatory barriers in order to facilitate competition."), *cited in* Kathleen Q. Abernathy, *My View from the Doorstep of FCC Change*, 54 FED. COMM. L.J. 199, 205 (2002).

[27] The Commission has recognized that "new wireless services . . . have great potential to stimulate economic growth and create thousands of jobs for Americans." *Competitive Bidding Second R&O*, at para. 4. *See also* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993: Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Sixth Report, 16 FCC Rcd 13350 (2001) at 82 (competition has been instrumental in shaping the mobile data sector).

This state of affairs is explained in part by the uncertainty caused by the fact that the Commission proposed Section 228 rules in this proceeding that would have a stultifying effect on the offering of these wireless-based voice information services, and then put the proposed rules on the shelf for eight years. But AWS also makes a convincing case that the services it plans to offer would be financially infeasible if the services were made subject to Section 228 requirements. AWS 2003 Comments at 5-6. Pilgrim believes that the Commission should give careful consideration to the concern that the panoply of Section 228 requirements, together with its proposed rules, would choke off wireless carriers' efforts to bring new services to the communications marketplace.

Third, while the Commission is rightfully committed to protecting consumers, it should also be committed to taking actions that benefit consumers (in addition to protecting them from deceptive or abusive practices). Overly cautious fixation on the former objective can have the effect of paralyzing Commission efforts to pursue the latter objective. There is strong reason to believe that the types of services AWS would like to offer would be greeted enthusiastically by consumers. The level of competition in the wireless marketplace also ensures that AWS's offerings would be matched by other carriers, giving consumers the benefit of a variety of affordable and innovative voice information services. While Pilgrim is by no means suggesting that the Commission should overlook or give little emphasis to its obligation to protect consumers from unreasonable or unfair practices, we do believe that the Commission's pursuit of this objective should not be allowed to block the flow of affordable, new services to the marketplace. Such a result is a loss — not a victory — for consumers.

Finally, Pilgrim believes that granting AWS's request would promote the provision of a diverse range of information services to consumers because it would help to counteract the

adverse impact on the information service industry caused by the diminishing number of interexchange carriers who transport pay per call service traffic. Providing the clarification sought by AWS would enable wireless carriers to open up a transport pipeline for voice information services, thus helping to revitalize an industry that has been increasingly crippled by the reduction of transport options.

2. The Clarification Sought by AWS Is Consistent with the Policy Objectives and Congressional Intent Reflected in Section 228 of the Act.

Pilgrim supports the claims presented by AWS that imposition of the Section 228 requirements on wireless carriers "would not advance the public policy concerns that fueled passage of Section 228." AWS 2003 Comments at 7. Stated another way, a Commission clarification that the requirements of Section 228 do not apply to wireless-based voice information services, in Pilgrim's view, would not threaten or dilute the Commission's consumer protection policies.

The reason for this is that policing mechanisms are in place that would discipline the offerings and practices of wireless carriers so as to ensure that consumers would not be harmed by deceptive or abusive practices. One such mechanism is the wireless communications marketplace. The highly competitive nature of this marketplace would tend to suppress any efforts by unscrupulous operators to design and carry out schemes to bilk consumers. Wireless carriers involved in the provision of voice information services would be highly motivated to curb such activities to avoid the adverse consequences that would result from the carriers' being associated in any way with service schemes designed to harm consumers. The adverse publicity and customer dissatisfaction that would ensue would translate into the loss of existing customers and difficulties in attracting new customers. These are risks that carriers seek to avoid in a highly competitive marketplace.

The disciplining power of the wireless marketplace should not be underestimated. Wireless carriers have a strong incentive to prevent their being tarred by practices that lead to customer dissatisfaction. This, of course, is because customers have the option to take their business elsewhere in the competitive wireless marketplace. This customer option has been strengthened even further by the Commission's wireless number portability requirements.

An additional reason that a Commission clarification that Section 228 does not apply to wireless-based voice information services would not undermine the Commission's consumer protection policies is that the types of services that would be made available by wireless carriers are far removed from the types of activities that prompted Congress to enact Section 228

Although Pilgrim believes that public policy considerations are important in weighing the advisability of clarifying Section 228 in the manner sought by AWS, and although Pilgrim also supports the views advanced by AWS that such a clarification would be consistent with congressional intent in enacting Section 228, Pilgrim also recognizes that the clarification sought by AWS must make sense within the four corners of the statute itself. The mechanism advocated by AWS for effecting the clarification, in Pilgrim's view, passes this test. AWS points to the directory services exception included in the statutory definition of pay per call services, and argues that the Commission should clarify that the types of wireless content-rich voice information services proposed to be offered by AWS will be treated as directory services and will thus fall within the Section 228(i)(2) exception.

The fact that Congress chose to leave the term "directory services" undefined gives the Commission discretion to develop its own definition of the term, so long as the definition is not inconsistent with the purposes and objectives of Section 228. As AWS points out, the Commission has already rejected suggestions to adopt a narrow definition of the term, finding

that doing so would disturb the congressional consideration and balancing of interests in its definition of pay per call services. AWS 2003 Comments at 6.

It is reasonable to conclude that Congress carved out directory services from its definition of pay per call services at least in part because of a conclusion that the provision of directory services would be unlikely to generate any concerns regarding deceptive or abusive practices and that, therefore, it was not necessary to bring to bear the protections enacted by Congress in Section 228. In reviewing the types of services that AWS proposes to offer, the Commission should reach the same finding, namely, that these services, when offered pursuant to the mechanisms AWS describes in its pleading,[28] do not pose any dangers to consumer interests that would warrant application of the Section 228 requirements. On that basis, the Commission should conclude that the clarification sought by AWS is warranted and would be consistent with the letter and spirit of Section 228.

3. At a Minimum, the Commission Should Initiate a Further Rulemaking in This Proceeding To Develop Alternative Means of Promoting Wireless-Based Voice Information Services.

The Commission may conclude that it is not appropriate to take final action on AWS's proposed clarification at this time because the issue requires further examination and comment, and because the Commission should have an opportunity to formulate and present for comment its own proposals with respect to the issues raised by AWS.[29]

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[28] AWS 2003 Comments at 8.

[29] Pilgrim in fact believes that a Further NPRM is warranted as a general matter in this proceeding because of changed circumstances since the Commission initially presented its tentative views and proposals in 1996. Pilgrim has urged the Commission to adopt a Further NPRM before taking any final action in this proceeding. Pilgrim 2003 Comments at ii, 20-21, 32-33. Pilgrim also believes that the 2004 NPRM falls short of the goal of making concrete and detailed proposals for regulatory action, thus requiring a further NPRM before final action is taken.

As we have discussed, Pilgrim supports the clarification sought by AWS because we believe a strong case has been made that policy considerations support the clarification and that the clarification would be consistent with the terms of the statute and would be reflective of congressional intent. But Pilgrim also urges the Commission that, if it harbors any doubts about the efficacy of AWS's proposal based upon the current record, then the Commission should, at a minimum, issue a Further NPRM in this proceeding to give interested parties a further opportunity to review and comment on AWS's proposal, and also to give the Commission a chance to propose possible alternative means for attaining the policy objectives that are the basis for AWS's proposed clarification.

In a Further NPRM the Commission could explore, for example, whether it has discretion to create "safe harbors" for wireless carriers with respect to the subscription agreement requirements in Section 228, based upon determinations by the Commission in particular cases that arrangements and mechanisms established by wireless carriers for their subscribers' ordering and use of information services are sufficiently effective in protecting consumers to warrant a finding that the wireless carriers are not required to make any further demonstration of their adherence to the subscription agreement provisions of Section 228.

Such an approach could be based in part on a finding that the risks of unauthorized calls to access a carrier's or an information service providers's services are lower in the case of wireless services than they are in the case of wireline services. Personal Communications Service (PCS) users, for example, can block the use of their cellphones by unauthorized users by using a code to lock the phones' keypads. In addition, the digital signals transmitted by cellphones are

scrambled in a manner that helps to defeat efforts to hijack cellphone information for unauthorized use of a subscriber's account.[30]

Pilgrim therefore urges that, if the Commission is hesitant to adopt the clarification based on the current record, then the Commission at a minimum should initiate a further rulemaking to examine other forms of relief that will enable wireless carriers to compete in the provision of voice information services.

4. Regulatory Forbearance for Wireless Information Services Is Justified and Should Be Granted by the Commission.

Pursuant to Section 332(c)(1) of the Act,[31] the Commission may grant regulatory forbearance from the applicability of any provision of Title II of the Act (except Section 201, 202, and 208). The Commission's list of sections which are not currently subject to forbearance is found at Section 20.15(a) of the Commission's Rules.[32] The Commission has, on numerous occasions, extended forbearance to wireless carriers from the applicability of various Title II requirements.[33] Pilgrim believes that forbearance from the provisions of Section 228 should also be extended to wireless providers.

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[30] Most wireless phones today operate on digital platforms. *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993: Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Seventh Report, FCC 02-179, released July 3, 2002, at 6 ("At the end of 2001, digital customers made up almost 80 percent of the industry total, up from 72 percent at the end of 2000.").

[31] 47 U.S.C. § 332(c)(1).

[32] 47 C.F.R. § 20.15(a).

[33] *See, e.g.*, Personal Communications Industry Association's Petition for Forbearance for Broadband Personal Communications Services, Biennial Regulatory Review — Elimination or Streamlining of Unnecessary and Obsolete CMRS Regulations, Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers, WT Docket No. 98-100, Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers, GN Docket No. 94-33, GTE Petition for Reconsideration or Waiver of a Declaratory Ruling, MSD-92-14, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857 (1998) (Commission forbore from requiring CMRS

The principal objectives of Section 228 are to ensure that consumers are aware of the charges for information services, and that the subscriber either incurs the charges or authorizes the charges. These objectives were discussed in the legislative history of the statute, and have been the subject of proceedings at both the Commission and the Federal Trade Commission. Each of these objectives has been discussed extensively in the context of wireline services, but never in the context of wireless services. Pilgrim submits that the reasons which make the Section 228 protections important for wireline services have no applicability to wireless services.

Wireline services consist of the establishment of a geographically fixed point of communications. The instrument used to access wireline communications is permanently fixed at one point, and anyone with access to that geographic location can make a call on the wireline instrument. It is precisely because of the general availability of a wireline instrument to persons other than a subscriber that Section 228 protections were deemed to be necessary.

Wireless phones and services are fundamentally different from wireline services. Wireless phones are not geographically specific, but are individual specific. Individuals carry them like they carry credit cards, and have continuous control over who uses the phones. All of the terms and conditions of service, and charges, are covered by agreements with the wireless providers. In this sense, wireless phones, unlike wireline phones, have the characteristics of both written presubscription agreements and credit cards. These unique aspects of the service arrangements between wireless carriers and their customers provide safeguards to wireless

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providers to file tariffs for most international services, and from applying most of Section 226 of the Act, relating to telephone operator services); Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411 (1994) (Commission forbore under Section 332(c)(1)(A) of the Act from requiring wireless providers to comply with the tariff filing obligations of Section 203, the domestic market entry and market exit requirements of Section 214, and several other provisions of Title II of the Act).

customers with regard to the types of consumer abuses that prompted enactment of Section 228. The presence of these safeguards supports a finding that enforcement of Section 228 in the case of wireless carriers is not necessary for the protection of consumers,[34] and that, therefore, the Commission should forbear from enforcing Section 228 in the case of wireless carriers.

In fact, the wireless industry is moving toward having cellphone accounts operate as credit instruments, where consumers can use their cellphones to purchase products and services, and have those items charged to the cellphone bill. As wireless phones, and the accounts under which usage is charged, are being used as charge instruments themselves, they are essentially exempt under the calling card or credit card exemptions, at a minimum, or could easily fall within the written presubscription agreement exemptions.

Pilgrim believes that the Commission has the authority and ability in this proceeding to find that in instances where wireless providers set forth the terms and conditions of the provision of information services over their networks, or any information providers disclose all of the terms and conditions on a per call basis, that such services may be provided under the relevant exceptions under Section 228. In the event that the Commission does not believe that it can either exercise forbearance, or adopt an application of the exemptions to wireless providers, based upon the current record, then Pilgrim urges the Commission to address such issues in a Further NPRM in this proceeding.

V. DISCUSSION OF BASIC STATUTORY PRINCIPLES

Pilgrim provided extensive comments and reply comments in the 1996 and 2003 proceedings. Pilgrim believes that, in addition to its specific comments above, analysis of the underlying statutory principles will help keep the Commission's deliberations focused, and

[34] See Section 332(c)(1)(A)(ii) of the Act, 47 U.S.C. § 332(c)(1)(A)(ii).

ensure that no rules are adopted that are outside of the Commission's jurisdiction or Congressional mandate.

A. Specific Amendments Made in 1996

In 1996 Congress made substantial amendments to the Telephone Disclosure and Dispute Resolution Act (TDDRA). Two of the most extensive changes made to the TDDRA were the deletion of the tariffed services exemption and the specific prohibition of 800 collect call back. At the same time, Congress expanded the permissible billing and dialing methods available to service providers, including rules surrounding the manner of providing information services over 800 numbers, other toll free numbers and other numbers generally, when offered and billed pursuant to two specific presubscription scenarios — one requiring advance written notification of terms and conditions and consent, and the other requiring oral disclosure and consent on each call.

These changes were made because Congress concluded that service providers were circumventing the rules by tariffing information services, or providing information services through expensive collect and international calling patterns. As a consequence, it closed these perceived loopholes. Congress removed the tariffed services exemption. Congress also prohibited the practice of following a call to an 800 number with a collect call to provide the service. Certain other "conversion" practices were prohibited, as well, such as "converting" a toll free call to a paid call during the course of the call.

Under the Federal Trade Commission's (FTC's) statute, Congress provided that the FTC must prohibit parties providing pay-per-call services from advertising "an 800 number, or any other telephone number advertised or widely understood to be toll free, from which callers are

connected to an access number for a pay-per-call service."[35] Congress also provided that the FTC must enact rules that prohibited providers of pay-per-call services from providing those services "through an 800 number of other telephone number advertised or widely understood to be toll free."[36]

B. The Congressional Amendments to Section 228 of the Act Present a Balanced Approach and a Roadmap for the Commission's Rules To Follow.

The Commission's attempt in this proceeding to develop a regulatory framework for the provision of pay per call services must be informed by an understanding of the balanced approach that underlies the congressional action in amending Section 228. The new statutory regime must be assessed both in terms of what Congress did and what Congress did not do. For example, Congress acted to eliminate the tariffed services exemption that, in the judgment of Congress, had unreasonably impaired effective regulatory oversight with respect to the operations and offerings of the pay per call industry.

Congress also acted to impose tough requirements to ensure that pay per call providers furnish product and service information to potential customers that is sufficient to enable informed consumer choices. Finally, Congress acted to set up a new statutory structure that opens the way for increased flexibility for carriers and service providers to design and provide a variety of dialing and billing patterns for information and entertainment services.

At the same time, there are two significant actions that Congress did *not* take. Congress refrained from requiring that all information and entertainment services must be provided via the use of 900 numbers. In addition, Congress did not require that pay per call providers cannot

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[35] 15 U.S.C. § 5711(a)(1)(I).

[36] 15 U.S.C. § 5711(a)(2)(F).

provide any service to a customer unless that customer makes a written request in advance of receiving the service.

It is the responsibility of the Commission, in implementing the amendments to Section 228, to stay on the road mapped out by Congress, and to avoid wandering down paths of regulatory requirements that were not charted by Congress. The amendments to Section 228 reflect rational and reasonable judgments by Congress intended to protect and serve consumers while at the same time promoting the growth and expansion of a robust pay per call industry. The Commission's rules must serve those same objectives.

C. The Commission Should Avoid Broad Prohibitions Which Will Accelerate Migration of Information Services to New Platforms.

The Commission should avoid attempts to curtail migration by information service providers. Pilgrim supports efforts by the Commission to curb the machinations of any unscrupulous operators whose sole intent is to insulate their operations from statutory and regulatory requirements. There are a variety of legitimate factors, however, leading pay per call providers to attempt to shift their calling and billing patterns away from a dependence upon 900 service provision and access. The Commission should avoid unwarranted restrictions that would interfere with the implementation of new dialing and billing patterns that are grounded in sound economic reasons, and are not attempts to "game" the system for purposes of skirting the statute and the Commission's rules.

Pilgrim reiterates its opposition to extension of the toll free dialing restrictions to other non-toll free dialing patterns. This type of regulatory restriction leads the Commission down the path of attempting to anticipate each and every new type of dialing and billing pattern in the hope that prophylactic prohibitions against all these new patterns will better ensure compliance with the statute. But such an approach by the Commission inevitably will stifle the legitimate

provision of services. The Commission should develop a regulatory approach to the dialing and billing pattern migration issue that minimizes intrusion upon the legitimate operations of pay per call providers.

An important part of a solution that both prevents migration by unscrupulous operators but also does not impede migration for legitimate business purposes should be a decision by the Commission to mandate access to 900 blocking request information. Such a mandate would serve consumers because information service providers using new dialing and billing patterns would be able to honor blocking in circumstances in which doing so would comport with a customer's wishes. The mandate would also facilitate, rather than impede, the provision of pay per call services that are designed to avoid problems associated with the use of 900 calling patterns but are not intended to avoid regulatory requirements.

D. The Commission Should Adopt Rules Which are Consistent With Its Interpretations in Recent Cases.

Although the Commission has failed to move forward with any rulemaking action since Congress amended Section 228 in 1996, the Commission has at various times sought to interpret the legislation. We summarize in the following paragraphs some of the key interpretations that have been developed by the Commission, and we recommend that the Commission now take the steps necessary to codify these interpretations as part of its rules implementing Section 228.

The collect call back prohibition in the statute is limited to the use of 800 numbers in direct call back scenarios, and does not prohibit the use of collect calls generally, or in conjunction with other calling patterns, and does not prevent the use of normal common carriage in the delivery of, and charging for, such calls so long as the charges do not exceed common carrier charges. The prohibition does not address, either explicitly or implicitly, whether the use of non-toll free calls in combination with return collect calls to deliver information is proper.

We believe that Commission rulings issued since the 1996 amendments on related business relationships between carriers and information service providers, in combination with the TDDRA's silence on the relationship between non-toll calls and return collect calls, indicates that calling patterns that use non-toll free numbers in conjunction with collect calls would not be illegal, either under the specific provisions of the TDDRA or under the general anti-fraud provisions of Section 45 of the FTC Act.

Use of common carriage to deliver and charge for information service calls should not be prohibited or disturbed absent active ownership relationship between the carrier and the information service provider, or collaboration. Collaboration arises when a service provider and a carrier enter into a relationship which forces a consumer to use a particular carrier to carry an information service call, where the charge for the call may be higher than that usually charged by the consumer's own carrier. The carrier compensates the information service provider for the increase in call traffic by paying it a commission. This practice is heavily used in international calling patterns, where per minute costs tend to be high, but also occurs in various domestic calling situations.

Commission decisions have engaged in specific discussions of the problems related to sweetheart deals between carriers and service providers. The Commission has previously determined that calling patterns in which the information service providers and common carriers conspired to limit a consumer's choice of carrier to a particular high cost provider, with the common carrier paying a commission to the information service provider for generating the call traffic, was an unjust and unreasonable practice under Section 201(b) of the Communications Act.

In particular is a Commission opinion letter[37] that stated that "[t]hrough payments to an information provider..., a carrier would abandon objectivity and acquire a direct interest in promoting the delivery of calls to a particular number for the provisions of a particular communication." In the Marlowe Letter, the Common Carrier Bureau concluded that commission payments from carriers to information service providers violated Section 201(b) of the Communications Act.

The Commission has overturned this prior interpretation. In *Jefferson Telephone*[38] the full Commission expressly overruled the Marlowe Letter, to the extent inconsistent with the order, and established new Commission precedent. The Commission found that so long as a common carrier provides service indifferently and indiscriminately to all customers and interconnecting carriers, it does not otherwise violate the Communications Act by paying commissions to information service providers for having generated traffic over the carrier's network. The Commission found that there was no unlawful interest between the carrier and the information service provider, even when the agreement between the carrier and provider required the carrier to engage in certain marketing efforts and to block intrastate calls to the information service provider.

While the *Jefferson Telephone* case involved AT&T's payments of access charges to Jefferson Telephone, the recognition and endorsement of commission payments in conjunction with information services is significant. The Commission's opinion follows a long line of cases where the Commission has recognized the payment of commissions to parties for the generation of call traffic. The Commission did not criticize any aspect of Jefferson Telephone's practices,

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[37] Ronald J. Marlowe, 10 FCC Rcd 10945 (CCB-ED 1995) (Marlowe Letter).

[38] AT&T Corporation v. Jefferson Telephone Company, 16 FCC Rcd 16130 (2001).

or those of the underlying information service provider. Based on these decisions, the Commission should now codify a rule stating that such commission structures do not inherently change the communications common carrier nature of the call, even when used to provide information service delivery.

In another case in which AT&T raised both unlawful conduct under Section 201(b) and violations of Section 228, the Commission ruled on the Section 201 issues, and declined to address the Section 228 issues as moot. In *Total Telecommunications*,[39] the Commission found that the relationship between Total Telecommunications Services and its affiliate, Atlas Telephone Company, was a sham designed to create increased access charges for the sole purpose of creating higher commission payments to Audiobridge, an information service provider that was the only customer of Total. The basis of the Commission's determination was that Atlas and Total were not competitors or independent, and found that the arrangement and the charges levied on AT&T for access were unjust and unreasonable.

The Commission also found that it would be proper for Atlas to charge the industry NECA rate for these calls, and did not otherwise criticize Audiobridge's delivery of and compensation for information services under the commission arrangement. The Commission concluded that claims that the arrangement violated TDDRA were moot, but it undertook no separate enforcement of the TDDRA, or criticism of that aspect of the arrangement.

These interpretative decisions post-date both the amendments enacted by Congress, and the Commission's original NPRM. Pilgrim requests that the Commission codify this precedent into its new rules. Specifically, Pilgrim asks the Commission to determine that so long as a common carrier is not providing the actual content during the charged part of a call, that the call

[39] Total Telecommunications Services, Inc., et al v. AT&T Corporation, Memorandum Opinion and Order, FCC 01-84, File No. E-97-003, released March 13, 2001 (*Total Telecommunications*).

itself is not a pay-per-call service and is not subject to the TDDRA regulations. Such calls would be subject to all of the other consumer protections of the Communications Act. Pilgrim also requests that the Commission recognize that when audiotext is provided by an audiotext provider with no direct or indirect ownership relationship with the carrier for the calls, that the common carriage nature of the calls is not disturbed, and that the service delivery is not pay-per-call.

E. The Direction of Congress and Comply with Congressional Intent.

In this section, we expand upon our views regarding congressional actions and intent.

1. The Choices Made by Congress in Amending Section 228 Sought To Balance a Number of Policy Goals.

In reviewing the congressional objectives in amending Section 228, we will first examine the alternative billing methods permitted by Congress, and we will then turn to the issue of whether Congress intended to require written agreements in connection with the provision of pay per call services to end user customers.

a. Congress Decided That Presubscription Agreements Will Not Require Any Execution by Customers.

Congress authorized a presubscription billing method and specified that a written agreement must be delivered to the consumer before the service provider can impose any charges. Congress established a number of safeguards applicable to the presubscription billing method. For example, the written agreement submitted to the consumer must contain information specified in Section 228(c)(8), including rates, the name, address, and regular business telephone number of the information provider, notification of rate changes, and the subscriber's choice of payment methods.

The statute also requires issuance of a personal identification number (PIN) to the customer to guard against any unauthorized use of the account. It is important to emphasize, however, that Congress rejected any requirement that the customer must execute the agreement,

deciding instead that the advance provision of information to the consumer about the terms and conditions of the service would provide consumers with sufficient protection.

b. Congress Decided Not To Impose Advance or Written Agreement Requirements in the Case of Customers Choosing To Use Calling Cards To Pay for Information or Enhanced Services.

In permitting the use of calling cards — the second method identified by Congress for accessing information services over toll free numbers — Congress refrained from imposing any advance or written agreement requirements as a prerequisite to providing services to calling card customers. Unlike the presubscription method, the calling card method permits information services on 800 numbers without any preexisting agreement.

It is also important to understand the mechanics of calling card use, as authorized by the amendments to Section 228. Specifically, there is no need for an actual card or other kind of document to be issued by the carrier in order to provide service to end user customers via the calling card method. So long as the carrier issues a unique identifying number or code to the customer that allows for billing to the customer's telephone number, then the customer may originate calls from any location through use of the calling card. This can be done without any other documentation or advance subscription.

c. The Dual Billing Methods Authorized by Congress Recognize and Seek To Accommodate Current Trends in Carriers' Methods for Soliciting and Acquiring Customers.

It remains the case today that carriers rely upon the virtually instant issuance of calling cards over the telephone (without any other writing or other documentation) as one means of providing service to pay per call customers.[40] The Commission's rules must take account of the fact that Congress has enacted a statutory framework that does not intend to prohibit or impair

[40] See Pilgrim 1996 Comments at 15-17.

the opportunity for customers to make an informed, instantaneous, and electronic decision to be charged for a pay per call service. While Pilgrim agrees with the conclusion that Congress intended to protect consumers from unwanted charges related to toll free calls, we also assert that there was no congressional intent to bar or delay the imposition of charges in cases in which the calling party has willingly entered into the pay per call transaction.

Congress made three straightforward and reasonable choices in authorizing the use of calling cards for pay per call services. In doing so, Congress decided against imposing any system of pre-billing restrictions on the use of calling cards. The first congressional choice was to make sure that a calling party would be given a clear understanding of when a toll free call would turn into a call for which a charge would be imposed. Congress accomplished this by requiring the carrier to provide disclaimers and to enter calling card information before imposing any charges. But Congress rejected any requirement that these calls could not be made and billed without a preexisting agreement.

The second choice made by Congress was to avoid any requirements that would prevent or impair consumers from deciding to incur a charge for their calls in an easy and rapid manner, once the consumers have been supplied with sufficient information to ensure that they understand that a charge will be imposed.

Finally, Congress made the choice that there should not be any governmental interference in the business judgments of pay per call service providers so long as sufficient customer protections are established and the carriers are willing to assume the non-collection and other risks associated with the use of calling cards as payment mechanisms for pay per call services.

Congress, in devising billing methods for pay per call services, thus struck a balance designed to ensure that consumers are protected while service providers are permitted to provide

service to customers with a minimum of delays associated with billing-related requirements. Pilgrim believes that Congress has adopted an effective means of serving these two goals. It thus becomes the responsibility of the Commission to prescribe rules that reflect these core congressional principles and choices, and that are effective in implementing the congressional mandate.

2. Any Requirement that Presubscription Agreements Must Be Executed in Writing Was Rejected by Congress.

Any requirement that presubscription agreements must be executed in writing directly contravenes the choice made by Congress regarding this issue. Congress considered imposing such a requirement, whereby an information service provider would be required to secure a consumer's signature on a written agreement before billing for any calls, but Congress rejected this approach. Congress concluded that it is sufficient for the service provider to deliver a written agreement to the consumer. The Commission does not have any authority to go beyond the terms of the statute by adding a requirement that Congress specifically decided to exclude.

Moreover, even if it could be argued that the Commission does have authority to take such an action, imposition of such a requirement would be bad public policy. Requiring a consumer's written signature would have the obvious effect of burdening the delivery of services to the consumer, would force significant changes in the way information service providers interact with customers and provide their services, and would likely have a negative economic impact on the pay per call industry. Given the fact that the statute already has created the means of ensuring sufficient consumer protection, the Commission can avoid this bad policy result by simply following the statute.

Furthermore, in the 1996 Act, Congress set forth very specific requirements for the two permitted methods of providing information services via 800 numbers and billing these services

to a phone bill. As we have discussed above, the first method requires a written (including electronic) record of the terms and conditions to be sent to the consumer, but explicitly does not require execution of that agreement. The second method permits credit card and calling card charges, but only so long as there is a detailed disclosure of the terms, conditions and cost prior to a charge being levied on each call.

In its definition of calling cards, Congress did not deem it necessary to require a pre-existing agreement or written agreement nor did Congress find it necessary for an actual card to be issued. Rather, Congress simply stated that a calling card is an identifying number or code unique to the individual that is issued by a common carrier and enables the individual to be charged by means of a phone bill for charges incurred independent of where the call originates.

It appears that Congress recognized that the issuance of calling cards, even "instant" calling cards, is a common practice in the industry. Rather than focus on requiring a plastic card to be delivered to the consumer, Congress appears to have been more focused on requiring full disclosure of all the costs, terms, and conditions prior to any charges being levied. While it may be a worthwhile practice to issue an actual card under some circumstances, the issuer should be permitted to extend credit under the card, using its fraud control mechanisms, and should be permitted to assume the risks of extending credit under a card immediately upon its issuance.[41]

This practice would be consistent with that now practiced by many on-line merchants and by stores issuing credit generally. Most department stores and many on-line companies provide instant credit without a card, and without issuing a charge card at the time the initial credit is issued. The providers of information services should not be relegated to outmoded and slower

[41] Pilgrim fails to understand why a phone company should not be permitted to issue an instant credit card when retail businesses partake in the same practice as a matter of routine.

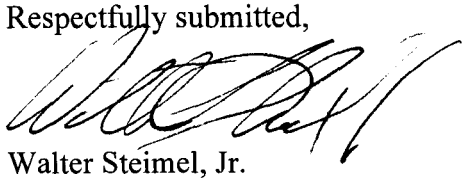
forms of credit issuance than ordinary in the normal chain of commerce, so long as they are willing to undertake the risk of the extending credit immediately upon issuance.

The Commission should rely on the detailed statutory definitions, prohibitions, and authorizations due to the fact that these regulations and protections have not been proven to be inadequate. At this time, there is no reason to depart from congressional intent and the statutory definition of calling card and forbid "instant" calling cards and require a card to be delivered prior to the assessment of any charges.

VI. CONCLUSION

Pilgrim respectfully requests that the Commission undertake a serious consideration of the comments filed in this proceeding, and adopt the proposals that Pilgrim sets forth herein.

Respectfully submitted,



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